# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

# LEISER CONSTRUCTION, LLC

and Case 17-CA-23177

IRON WORKERS LOCAL UNION NO.
10, affiliated with INTERNATIONAL
ASSOCIATION OF BRIDGE, STRUCTURAL,
ORNAMENTAL & REINFORCING IRON
WORKERS, AFL-CIO

Anne Peressin, Esq.
for the General Counsel.

Michael J. Stapp, Esq.,
for the Charging Party.

Thomas M. Moore, Esq.,
for the Respondent.

### **DECISION**

### **Statement of the Case**

LAWRENCE W. CULLEN, Administrative Law Judge: This case was heard before me in Overland Park, Kansas, on January 31, and February 1, 2006. The complaint is based on an amended charge filed by Iron Workers Local Union No.10, affiliated with International Association Of Bridge, Structural, Ornamental & Reinforcing Iron Workers, AFL-CIO ("the Union" or "the Charging Party") with the National Labor Relations Board ("the Board") and alleges that Leiser Construction, LLC ("the Respondent" or "Leiser Construction") has committed violations of Sections 8(a)(1) and (3) of the National Labor Relations Act ("the Act"). The complaint is joined by the answer filed by the Respondent wherein it denies the commission of any violations of the Act.

After due consideration of the testimony and evidence received at the hearing and the briefs filed by the parties, I make the following:

### **Findings of Fact and Conclusions of Law**

### I. The Business of the Respondent

The complaint alleges, Respondent admits and I find that at all times material herein the Respondent is and has been a corporation, with an office and place of business in Madison, Kansas, and it has been engaged in the construction industry providing construction services including steel erection services to commercial enterprises, that during the 12-month period ending December 31, 2004, Respondent in conducting its business operations, purchased and received at its Madison facility goods valued in excess of \$50,000 directly from points located outside the State of Kansas, and performed services valued in excess of \$50,000 in states other than the State of Kansas and that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

# **II.** The Labor Organization

The complaint alleges, Respondent admits and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

# III. The Alleged Unfair Labor Practices

This case involves the Union's efforts to organize Respondent's ironworker employees and the Respondent's response to these activities. Lloyd Leiser and his wife Sandra Leiser are management employees of Respondent and the owners of Respondent. Lloyd Leiser is the General Manager of Respondent and Sandra Leiser is the Office Manager of Respondent. Both Lloyd and Sandra Leiser are Section 2(11) supervisors and Section 2(13) agents of Respondent under the Act. Respondent has been in business approximately ten years and performs ironwork for the construction of commercial buildings. It is a nonunion company and performs ironwork primarily in the western portion of Missouri and in Kansas. Typically Respondent employs approximately ten individuals in the field performing ironwork in two or more crews under the direction of lead men and working foremen, all of whom report to Lloyd Leiser. Respondent's office in Madison, Kansas, is staffed by Sandra Leiser and her receptionist and secretary Tracy Thompson and her Assistant Sheena Scheck. Lloyd Leiser spends virtually all of his time in the field overseeing the crews and obtaining material and keeping the crews supplied with necessary equipment and material. Lloyd and Sandra Leiser keep in contact by phone during the workday. Lloyd checks into projects to be bid and forwards this information to Sandra Leiser who prepares bids for new contracts. Respondent receives applications for employment at the office and applicants are often interviewed initially by Sandra Leiser who sorts through these applications to cull down the applicants to those that appear to have the most experience for the work. On a typical month when Respondent has not advertised for employees, it may receive about ten applications at During periods when Respondent has advertised in local newspapers for candidates, it may receive 30 applications in a week. Sandra Leiser apprises Lloyd of the promising candidates for hire and they make decisions together. On occasion Sandra may make the hiring decision herself. Respondent maintains an employee manual which encompasses various rules and employment policies. Both Lloyd and Sandra Leiser testified they do not generally follow the manual but rather handle matters on a case by case basis.

In December 2004, Union organizer David Coleman learned of a steel erection job at the Oak Grove Middle School in Kansas City, Missouri, which was being constructed by the Respondent. He went to the job site and spoke to Lloyd Leiser about employment. He filled out a job application using false references of non-union contractors so as not to be identified as a Union supporter or member. He was hired by Leiser and worked there approximately a

month prior to his discharge by Lloyd Leiser on January 20, 2005, when he identified himself as a Union organizer and attempted to hand out Union cards to other employees following their lunch at a restaurant. His discharge by Lloyd Leiser was immediate.

Prior to this, Union President, Organizer and Assistant Business Agent Richard Christopherson went to Respondent's job site which was off of 7 Highway, Perimeter Park on January 11, 2005, and spoke to Lloyd Leiser who had been previously described to him by Coleman. He saw Coleman on the job but neither he nor Coleman acknowledged each other. Christopherson gave Lloyd Leiser one of his Union business cards and spoke to him about Respondent becoming a signatory to the Union's contract with companies performing steel erection work in the Union's territory and told him that he could send him some ironworkers. Leiser told him he had tried this in Detroit and had received nothing but bad help out of that hiring hall. Christopherson told him the Union had a lot of good help he could send him. Leiser said he was not interested.

On February 1, 2005, Christopherson telephoned Respondent's office in Madison, Kansas and spoke to Sandra Leiser and asked if Respondent was taking applications for ironworkers. She told him they were and that they had plenty of work. He asked her if she could send him two applications as he had a "buddy" who might also want to apply. She asked him why they had not gone through the Iron Workers Union that represented the iron workers in the Kansas City area as he had given her a Kansas City address as to where to send the applications. He asked her if it would make a difference if they were Union members and she said sure it would. He told her that he and his buddy Michael Bright were union organizers and intended to organize Respondent. He asked her if they could receive applications and she agreed to send them applications. However by February 21, 2005, they had not received the applications. Christopherson telephoned Respondent's office again and this time spoke to Respondent's secretary Tracy Thompson and told her he had spoken to Sandra who had told him she would send them applications but that they had not received them. Tracy agreed to send them two more applications which were received a few days thereafter. Both Christopherson and Bright partially filled out the applications which were sent to the Respondent. There were several places on the applications for them to list the most recent employers with their job title and rate of pay. Christopherson put down that he had been an ironworker for 24 years and listed his iron worker apprenticeship and various certifications and his current Union position as Organizer of the Union and Business Agent but he did not list the names of any employers. Bright did the same thing on his application, claiming 28 years of iron working experience his ironworker apprenticeship and various certifications and his current position as the Union's Business Agent and Organizer but not listing any employers. The applications were sent in on about February 24 and received by the Respondent about that date. This was during a period when Respondent was hiring. However Christopherson and Bright were never contacted by the Respondent.

The complaint alleges Respondent violated Section 8(a)(1) of the Act as follows:

(a) On January 20, 2005, at the Shorthorn Restaurant by telling its employees that it had discharged employees because of their union affiliation and other protected concerted activities.

- (b) On January 20, 2005, at the West Star jobsite telling employees that it would not hire employee-applicants who were affiliated with a union or who engaged in union or other protected concerted activities.
- (c) On March 31, 2005, at the 87<sup>th</sup> and Lackman jobsite interrogating its employees about their union affiliation and union membership, activities and sympathies.
- (d) On April 11, 2005, in a telephone conversation and on April 12, 2005, at 87<sup>th</sup> and Lackman jobsite telling employees that it had suspended its employees and/or prohibiting its employees from working because of their union and other protected concerted activities.
- (e) In a telephone conversation on April 11, 2005, and on April 12, 2005, at its 87<sup>th</sup> and Lackman jobsite threatening its employees with reprisal and retaliation because of their union and other protected concerted activities.
- (f) On April 12, 2005, at its 87<sup>th</sup> and Lackman jobsite threatening employees with physical violence because of their union and other protected concerted activities.
- (g) On April 12, 2005, at its 87<sup>th</sup> and Lackman jobsite prohibiting employees from wearing union emblems or logos at work.
- (h) During a telephone conversation wherein Sandra Leiser on February 1, 2005, told employee-applicants that their union affiliation and their union and other protected concerted activities would adversely affect their chances to be hired by Respondent.

I find the Respondent violated Section 8(a)(1) of the Act as follows:

(a) and (b) On January 20, 2005, at the Shorthorn Restaurant, Lloyd Leiser discharged employee David Coleman after Coleman disclosed that he was a Union organizer, Leiser told Coleman he was fired because he was an organizer, Lloyd said, "see you." When Coleman asked if he was fired, Lloyd said, "Yep. Good while it lasted." After this Coleman returned to the job site to return Lloyd's hard hat to him. At that point Coleman asked Leiser if he would have hired him if he had informed him he was a Union ironworker and Leiser said, "No."

In the above instances Leiser's comments to Coleman that he was discharged and would not be hired because of his union affiliation were made in the presence of Leiser's employees and were inherently coercive and violative of Section 8(a)(1) of the Act.

(c) Travis Williams testified that on March 31, 2005, he met with Lloyd Leiser in an interview for a job and that during the interview Leiser asked him if he was affiliated with any unions in the area.

I find that the inquiry about Williams' affiliation with any unions in the area during a job interview was inherently coercive and violative of Section 8(a)(1) of the Act.

(d) through (g)On April 11, 2005, Travis Williams disclosed he was a voluntary union organizer and attempted to organize the other employees at the Scott City, Kansas jobsite where he was working. Respondent's superintendent, Brian Muting, to whom he had disclosed his intentions said that he needed to call Lloyd Leiser and commented that "Lloyd is probably going to do to you what he did to the last person." Muting called Lloyd and said, "They did it again. He's a member of the Local." Muting then told Williams that he needed to drive back to Kansas City and be on Lloyd's job at 7:00 o'clock in the morning. Williams did not know which job was Lloyds. Muting then called Lloyd again and Lloyd said to be at the 87<sup>th</sup> and Lackman job. Muting then gave the phone to Williams and Lloyd said, "you weaseled your way in didn't you." He said, "That's all right. I know how to take care of people like you. You just be on my job at 7 o'clock in the morning and don't worry about what you'll be doing. You'll do what I tell you. You've got 15 minutes to get off that job." Lloyd was yelling when he made the above comments. Williams then left the jobsite.

On the next day Williams went to the 87<sup>th</sup> and Lackman job site accompanied by Coleman as Williams was apprehensive of what Lloyd might do. Leiser showed up about 7 o'clock. There were other employees on the job site. Williams told them he was a member of the Union and that he was there to organize the Respondent and offered them Union cards. He told Leiser he was there to work. Leiser said, "Well, the reason I want you here is to have a little chat." Leiser also said he did not want Williams talking about any of "that Union bullshit" to those guys and that there was a guy on that job that "probably would have killed me." Williams told Leiser he was there to work. Leiser said he was not going to work him with the Union sticker on his hard hat. Another employee suggested that they work Williams to see what he can do and "Lloyd said, no, he don't work with liars." Williams then left and told another person standing there that he was going on strike.

I find the foregoing evidence supports a finding that Respondent violated Section 8(a)(1) of the Act on April 11 and 12, 2005, by telling Williams in the presence of other employees that he was suspended or to leave the job site on April 11 and was refused the right to work on April 12. On both occasions Leiser's comments were threats of reprisal and retaliation because of their union and other protected concerted activities. On April 12<sup>th</sup>, Leiser's comments to Williams that someone on that job would have probably killed him was a threat of physical violence. The prohibition to Williams by Leiser on April 12, that he could not work while wearing a Union sticker on his hardhat was also violative of Section 8(a)(1) of the Act.

(h) The comments made by Sandra Leiser during a telephone conversation with Union Business Agent Richard Christopherson that his union affiliation and that of Business Agent Michael Bright would affect their chances for employment violated Section 8(a)(1) of the Act.

# The Discharge of David Coleman

David Coleman is a full time organizer for the Union. In early December, 2004, he learned from another Union member that the Respondent was engaged in a job at the Oak Grove Middle School in Kansas City, Missouri. He discussed this with Richard Christopherson who is the Union's Assistant Business Agent, President and organizer and

with Michael Bright who is Respondent's Business Agent and organizer. It was decided that Coleman would apply for a position with Respondent as an ironworker. Coleman approached Owner Lloyd Leiser on the job site seeking employment as an ironworker. Leiser gave him an application and he filled it out and returned it to Leiser. Although Coleman had considerable experience as an ironworker through work at various contractors through referrals by the Union, he did not list any union employers. During his initial discussion with Leiser, he was told by Leiser that Respondent was a non-union company and he indicated this was not a problem. Coleman was hired and worked at the Oak Grove jobsite from December 30, 2004, until January 20, 2005. By the accounts of both Lloyd Leiser and Coleman, Coleman did good work and this was acknowledged by Leiser. On January 20, 2005, Coleman went to lunch with Lloyd Leiser and several other crew members at the "Shorthorn" Immediately after lunch, Coleman told Lloyd Leiser, "this is where our relationship goes south" and proceeded to hand out union cards. He also told Leiser, "I'm an organizer, man." Leiser said, "See you." Coleman asked, "I'm fired?"" Leiser said, "Yep. Good while it lasted." Coleman then returned separately to the jobsite to retrieve his tools and to return Lloyd Leiser's hardhat which had been left in Coleman's vehicle as Leiser had rode with Coleman to the restaurant. On his return to the job site he spoke with Leiser and asked him if he would have hired him if he had disclosed his union membership to him and Lloyd said, "No!" At the hearing Leiser did not dispute the foregoing testimony of Coleman but testified he offered to return Coleman to work. Coleman denied this. I credit Coleman. Leiser contended that he had discharged Coleman for falsifying his application. undisputed that Leiser had not checked Coleman's references. It also appears from the record that Respondent does not usually check the references of applicants it hires.

# The Suspension and Discharge of Travis Williams

Employee Travis Williams testified that in December of 2004, he observed a Leiser construction jobsite off of 7 Highway and 83<sup>rd</sup> Streets. In February of 2005, he went to this jobsite and asked an employee named Jim Wills if Respondent was hiring. Wills told him he thought they were hiring and gave him the office telephone number. He called the telephone number and talked to a lady named Tracy and asked her if Respondent was hiring. She told him they were hiring and said she would mail him an application. He received an application a couple of days later. He had worked for union companies prior to this and wrote down these employers' names as references on the application. After he received the application he went to the Union hall and spoke to Coleman who told him Respondent would probably not hire him with the Union references on the application. He had already called Tracy and asked her to send him another application which he received a couple days later. He filled out the second application without the union references on it and sent this to Respondent. He wrote "ironworker" on the top of the application where it asks the position being applied for. Williams listed three nonunion employers where he had worked including himself as selfemployed. Under the category of skills on the application he listed welding, metal side barns, tie bar, torch work, woodwork, metal roofs and electrical work all of which he has done. He also has several skills which he did not list which involve the ironworking trade such as he has batted up, worked with cranes and I-levels and completed the three year ironworker apprenticeship program. He omitted these skills so as not to reveal his union affiliation. He mailed the application to Respondent and did not initially hear from Respondent. telephoned and again talked to Tracy who said they were still hiring. She found his

application and called him back and asked him to come in for an interview with Lloyd Leiser. He met with Lloyd Leiser at the Sunrise Assisted Living facility at 87<sup>th</sup> and Lackman jobsite wearing a recording device and tape recorded the conversation he had with Lloyd Leiser. The tape and transcript thereof were introduced into evidence and reflect Williams' recollection of the conversation. He did not reveal any of his union work history to Leiser. During the conversation Leiser asked him if he was affiliated with any union in the area. Leiser told him that he had no experience at the type of work involved but he thought he would give Williams a "shot." Leiser told Williams he needed to talk to his wife Sandra and they would probably get hold of him in a day or two with wages. Tracy telephoned him the next day. She offered him \$11.00 per hour and he accepted this. He went to the Respondent's office in Madison, Kansas and was given a drug test and he went through a safety oriented class on April 4, 2005. He commenced work with Respondent on April 7, 2005, a Thursday, and was assigned to the Scott City, Kansas job site. He also worked on April 8, a Friday. He did not work Saturday or Sunday. He worked on Monday, April 11<sup>th</sup> at the Scott City job. He worked with two other employees known to him as Brian Muting and Dan. After lunch on that date he called Coleman to apprise him he was going to hand out union authorization cards. He put on his regular hard hat which had a number of Union stickers on it and a long-sleeved T-shirt which had "ironworkers" on it and went over to Brian's truck and told Brian he was a member of Iron Workers Local 10 and was there to organize Leiser Construction and offered him an authorization card. Brian declined to take the card. He then went to Dan's truck and told him the same thing and offered him a card and Dan declined to take it. He then went back to his vehicle, put on Leiser's hard hat, and safety glasses and his other shirt and tried to return to work. Brian stopped him and said he needed to call Lloyd first and see what Lloyd wanted to do. Brian said, "Lloyd is probably going to do to you what he did to the last person." Brian called Lloyd and said, "They did it again. He's a member of the Local." Brian got off the phone and told him that he should be on Lloyd's job at 7 a.m. in the morning. He (Williams) did not know which job, Lloyd wanted him at, so Brian called Lloyd again and Lloyd said he wanted him at the 87<sup>th</sup> and Lackman job. Brian then told him that Lloyd wanted to talk to him and handed him the phone. Lloyd said, "You weaseled your way in, didn't you?" and "That's all right. I know how to take care of people like you. You just be on my job at 7 o'clock in the morning and don't worry about what you'll be doing. You'll do what I tell you. You've got 15 minutes to get off that job." Williams then left.

Williams testified that he asked Coleman to meet him at the 87<sup>th</sup> and Lackman jobsite on the next morning as he feared there might be a fight and he was scared. Williams and Coleman met at the jobsite at 6:30 a.m. the next morning, and both parked across the street. Williams had his tools and his hard hat on. Coleman placed some literature regarding the Union's wages and benefits on Respondent's equipment. Leiser arrived around 7 a.m. with a passenger in his truck and three or four more cars pulled up at the same time. Leiser parked his truck about six feet from Williams and a passenger got out of Leiser's truck and the other employees began to gather there. Williams told them he was a member of Local 10 and was there to help organize the Respondent and offered them authorization cards. He told Leiser he was there ready to go to work. Leiser said, "Well, the reason I want you here is to have a little chat." Leiser told Williams he had told him to leave the jobsite yesterday because he didn't want him talking any of that "Union bullshit" to the group and there was a guy on that job that "probably would have kill(ed)" him. Williams told Lloyd he was there to work. Lloyd told him that he would not permit him to return to work with the sticker on the hard hat

which Williams was wearing. Lloyd testified that the hardhat had a cartoon on it that depicted someone urinating on a rat identified as a non-union construction firm. Lloyd said he did not work with liars and did not run his business that way. Williams began to leave but turned back and told Lloyd he was going on strike and then left.

### Analysis

I find that General Counsel has established a prima facie case that both Coleman and Williams were unlawfully discharged because of their union affiliation and engagement in protected concerted activity. In both cases these two employees were hired by Respondent upon the submission of job applications to Respondent and after having been interviewed by Respondent. In the case of Coleman it is undisputed that he was praised for doing good work by Lloyd Leiser. In the case of Williams it is undisputed that no work performance issues were involved in his discharge. However, once Lloyd Leiser learned of their Union membership and their attempt to organize Respondent's employees, Coleman was immediately discharged and Williams was immediately suspended and discharged on the next morning.

In *NLRB v. Town and Country Electric*, 516 U.S. 85 (1995) the United States Supreme Court recognized that the rights of union organizers to apply for jobs and to hold those jobs are protected by Section 7 of the Act. Their union organizer status does not diminish their rights to the protection of Section 7 of the Act. In the instant case the evidence clearly establishes that Coleman and Williams did not commit any act which would deprive them of the protection of the Act. Clearly they were discharged because of their engagement in protected concerted activities and their status as union organizers.

Under *Wright Line*, 251 NLRB 1083 (1980) end. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert denied 455 U.S. 989 (1982) the General Counsel has the initial burden to establish that:

- 1. The employees engaged in protected concerted activities.
- 2. The employer had knowledge or at least suspicion of the employees' protected activities.
  - 3. The employer took adverse action against the employees.
- 4. A nexus or link between the protected activities and the adverse action underlying motive.

Once these four elements have been established, the burden shifts to the Respondent to prove, by a preponderance of the evidence that it took the action for a legitimate non-discriminatory business reason. In *Fluor Daniel, Inc.*, 304 NLRB 970 (1991) the Board said that once the General Counsel makes a prima facie case that protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In the instant case all of the elements set out in *Wright Line*, *supra* as also addressed by *Fluor Daniel*, *supra* have been satisfied. The undisputed testimony establishes that Coleman and Williams were engaged in protected concerted activities in their efforts to organize Respondent's employees. Lloyd Leiser became aware of this and immediately discharged Coleman and immediately suspended Williams and discharged him the next morning for their engagement in their efforts to organize Respondent's employees, thus establishing the nexus between the protected activities and the adverse action underlying motive. I find that the General Counsel has established prima facie cases of violations of Sections 8(a)(1) and (3) of the Act and that Respondent has failed to rebut the prima facie cases by the preponderance of the evidence.

# The Refusal to Hire/Consider For Hire

The Respondent ran ads in local newspapers advertising for ironworkers between December 20, 2004 and November 2005, it hired thirteen Ironworkers following the filing of the applications of Christopherson and Bright. The Respondent's records show it accepted applications from several employees who had submitted applications after Christopherson and Bright submitted their applications and who were hired. Both Christopherson's and Bright's applications showed 24 years and 28 years of ironwork experience respectively although they did not list any of their employers but referenced only their status as Union officials.

The elements that General Counsel must prove to establish a Refusal to Consider for Hire are:

- 1) the employer excluded applicants from the hiring process and
- 2) antiunion animus was a contributing factor for the employer's failure or refusal to consider the applicants for hire. *FES*, 331 NLRB 9, 15 (2000). Once these two elements have been established, the burden shifts to the employer to prove that it would not have considered the applicants in the absence of their union activities. *Wright Line*, 251 NLRB 1083 (1980); enf, 662 F.2d 899 (1<sup>st</sup> Cir. 1981).

The elements of a refusal-to-hire case are:

(1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination and (3) that antiunion animus contributed to the decision not to hire the applicants. *FES*, *supra*; *Wright Line*, *supra*, *FES*, 331 NLRB 9, 12 (2001), enfd. 301 F.3d 83 (3d Cir. 2002)

In the instant case I find that the General Counsel has established a prima facie case of the Refusal To Consider for Hire allegation and the Refusal To Hire allegation. Christopherson's testimony is unrebutted. He contacted Respondent by telephone on February 1, 2005, spoke to Sandra Leiser and asked for applications for himself and Bright.

He disclosed to Sandra Leiser that he and Bright were Union organizers and asked whether this would make a difference and Sandra Leiser said well sure it would and laughed and then said at least I can send you an application. When the applications were not received by Christopherson and Bright, Christopherson called Respondent again on February 21, 2005, and spoke to Sandra Leiser's secretary Tracy. She agreed to send them applications which they received in a couple days. Christopherson did not tell Tracy that he and Bright were Union organizers prior to this request. Other employees such as Travis Williams on two occasions and applicant Steve Miller asked for applications and received them within a couple days. Although Christopherson and Bright filed their applications on about February 24, 2005, they have never been contacted by Respondent as of the date of the hearing in this case, although they clearly appear more qualified on the basis of their claimed experience than any other applicant whom Respondent hired between December 2004, and the date of the hearing. Both Christopherson and Bright have completed their three year apprenticeship and have over 20 years of ironworker experience and have welding and other certifications. Sandra Leiser told Christopherson that Respondent was looking for welding experience and Tracy told him they were still looking to fill the positions for which Respondent had advertised in various local newspapers during the period from December 2004 to February in 2006. Respondent's antiunion animus has been demonstrated by the independent Section 8(a)(1) violations including interrogation concerning applicant Travis Williams' union affiliation, threats of retaliation and physical violence and statements made by Lloyd Leiser that he would not hire union members and Sandra Leiser's statement to Christopherson that his and Bright's status as union organizers would make a difference (presumably a negative one) in their chances for hire. Additionally the Respondent's animus is demonstrated by the two Section 8(a)(1) and (3) cases wherein Coleman was discharged immediately upon his disclosure that he was a union organizer and Travis Williams was immediately suspended and discharged the next morning after he disclosed he was a union organizer. The evidence clearly demonstrates that Respondent had plans to hire and was in the process of hiring when Christopherson and Bright applied. Respondent hired at least thirteen employees after Christopherson and Bright filed their applications.

Respondent's defense to the exclusion of Christopherson and Bright from its hiring process and the refusal to hire them is without merit. I find that Respondent's arguments such as its assertions that it has hired other union members or union affiliated applicants is unconvincing as these instances all involved other unions or tenuous or dated relationships. In no case did Respondent cite an instance wherein it hired a member or affiliate of the Union in this case wherein the Union was attempting to organize its employees. I do not credit Sandra Leiser's assertion at the hearing that Respondent does not consider applications more than 30 to 60 days old, and her contention that Christopherson's and Bright's applications would not accordingly have been considered more than 30 to 60 days after February 24, 2005, which was the date on their applications. This assertion is refuted by the hire of applicant Joe Taylor whose application was more than nine months old at the time of his hire and applicant Steve Kozubek's application which was more than 60 days old when Respondent hired him. Respondent's contention that it gives preference to prior employees or referrals is unsupported by the record evidence. There is no reference to such a policy in Respondent's Policy Manual.

Accordingly, I find that Respondent has failed to rebut the prima facie cases of the unlawful refusal to consider for hire and to hire.

### Conclusions of Law

- 1. Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
  - 3. The Respondent violated Section 8(a)(1) of the Act by:
- (a) Telling employees that it had discharged employees because of their union affiliation and other protected concerted activities.
- (b) Telling employees it would not hire employee-applicants who were affiliated with a union or who engaged in union or other protected concerted activities.
  - (c) Interrogating an employee about his union affiliation.
- (d) Telling employees that it had suspended its employees and/or prohibited its employees from working because of their union and other protected concerted activities.
- (e) Threatening its employee with reprisals and retaliation because of his union and other protected concerted activities.
- (f) Threatening its employee with physical violence because of his union and other protected concerted activities.
- (g) Prohibiting its employee from wearing union emblems or logos at work.
- (h) Telling an employee applicant that his union affiliation status as an organizer and union official would adversely affect his chances to be hired.
- 4. Respondent violated Sections 8(a)(1) and (3) of the Act by its suspension and discharge of employee Travis Williams, its discharge of employee David Coleman and by its refusal to consider for hire and to hire employee-applicants Richard Christopherson and Michael Bright because of their union membership and their engagement in union and other protected concerted activities.
- 5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

## The Remedy

Having found the Respondent has engaged in the above violations of the Act, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the policies and purposes of the Act and post the appropriate notice. It is recommended that Respondent cease the unlawful threats, interrogations, prohibitions, suspension and discharges and refusals to consider for hire and to hire found above and offer immediate reinstatement to employees Travis Williams and David Coleman. It is recommended that Respondent rescind the unlawful suspension and discharges. The employees shall be reinstated to their prior positions or to substantially equivalent ones if their prior positions no longer exist. The employees shall be made whole for all loss of backpay and benefits sustained by them as a result of Respondent's unfair labor practices. It is recommended that employees Christopherson and Bright be considered for future employment in accordance with nondiscriminatory criteria and if it is shown that they would have been hired for any job openings, they shall be hired and made whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. All of the backpay amounts shall be computed in the manner prescribed in F.W. Woolworth Co., 90 NLRB 289 (1950), with interest as computed in New Horizons for the Retarded, 283 NLRB 1173 (1987) at the "short term federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:

### **ORDER**

The Respondent, Leiser Construction, LLC, its officers, agents, successors, and assigns shall:

### 1. Cease and desist from:

(a) Telling employees that it had discharged employees because of their union affiliation and other protected concerted activities.

- (b) Telling employees that it would not hire employee-applicants who are affiliated with a union or who engage in union or other protected concerted activities.
- (c) Interrogating employees about their union affiliation and union membership, activities and sympathies.
- (d) Telling employees that it had suspended its employees and/or prohibited its employees from working because of their union and other protected concerted activities.

If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (e) Threatening employees with reprisals and retaliation because of their union and other protected concerted activities.
- (f) Threatening its employees with physical violence because of their union and other protected activities.
  - (g) Prohibiting employees from wearing union emblems or logos at work.
- (h) Telling employee applicants that their union affiliation and their union and other protected concerted activities would adversely affect their chances to be hired by Respondent.
- (i) Suspending, discharging or otherwise discriminating against its employees in retaliation for their union or other protected concerted activities.
- (j) Failing or refusing to hire or consider applicants for hire because of their union affiliation or its belief or suspicion that they may engage in union activities once they are hired.
- (k) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the National Labor Relations Act.
  - 2. Take the following affirmative actions to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order rescind the suspension and discharge of Travis Williams and the discharge of David Coleman and offer them full reinstatement to their former jobs or if those jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed, and expunge from its files the unlawful suspension and discharge of Travis Williams and the unlawful discharge of David Coleman.
- (b) Within 14 days from the date of this Order offer Richard Christopherson and Michael Bright instatement to the positions for which they applied. If those positions no longer exist, offer them employment in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.
- (c) Consider Richard Christopherson and Michael Bright for future employment, in accordance with nondiscriminatory criteria, and notify them, the Union, and the Regional Director for Region 17, in writing of future openings in positions for which they would have applied, or substantially equivalent positions. If it is shown at a compliance stage that, but for the failure to consider them, the Respondent would have selected them for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, the Respondent shall hire them for any such positions and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest in the manner set forth in the remedy.

- (d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension, discharges, refusals to hire and to consider for hire the above named discriminatees, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.
- (e) Make whole Travis Williams, David Coleman, Richard Christopherson and Michael Bright for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.
- (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (g) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix" at its facility in Madison, Kansas. Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 2004.
- (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C., May 3, 2006.

Lawrence W. Cullen Administrative Law Judge

If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "posted by order of the National Labor Relations Board" shall read "posted pursuant to a judgment of the United States Court of Appeals enforcing an order of the National Labor Relations Board."

### **APPENDIX**

### NOTICE TO EMPLOYEES

# Posted by the Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

**WE WILL NOT** threaten our employees by telling them we had discharged employees because of their union affiliation and other protected concerted activities.

**WE WILL NOT** tell employees that we will not hire employee-applicants who are affiliated with a union or who engage in union or other protected concerted activities.

WE WILL NOT interrogate our employees about their union affiliation and union membership, activities and sympathies.

**WE WILL NOT** tell employees that we have suspended our employees or prohibited them from working because of their union and other protected concerted activities.

**WE WILL NOT** threaten our employees with reprisals and retaliation because of their union and other protected concerted activities.

**WE WILL NOT** threaten our employees with physical violence because of their union and other protected concerted activities.

**WE WILL NOT** prohibit employees from wearing union emblems or logos at work.

WE WILL NOT tell employee-applicants that their union affiliation and their union and other protected concerted activities will adversely affect their chances to be hired.

**WE WILL NOT** suspend, discharge or otherwise discriminate against our employees in retaliation for their union or other protected concerted activities.

WE WILL NOT fail or refuse to hire or to consider applicants for hire because of their union affiliation or our belief or suspicion that they may engage in union activities once they are hired.

LEISED CONSTRUCTION LLC

**WE WILL NOT** in any other manner interfere with, restrain or coerce our employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

**WE WILL**, within 14 days from the date of the Board's Order, rescind the unlawful suspension of Travis Williams and discharges of Travis Williams and David Coleman and offer them full reinstatement to their former jobs or if those jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed.

**WE WILL** make whole Travis Williams and David Coleman for any loss of earnings and other benefits suffered as a result of the discrimination against them with interest.

WE WILL consider Richard Christopherson and Michael Bright for future employment, in accordance with nondiscriminatory criteria, and notify them, the Union, and the Regional Director for Region 17, in writing of future openings in positions for which they would have applied, or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that, but for the failure to consider them, we would have selected them for any other job openings, we will hire them for any such position and make them whole for any loss of earnings and other benefits, with interest.

**WE WILL**, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharges and to the unlawful refusal to consider for hire and to hire the above-named discriminatees and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

	By:_	(Employer)		
<b>Dated:</b>				
	•	(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

8600 Farley St., Ste. 100, Overland Park, KS 66212-4677. (913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (913) 967-3005